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IN THE
Supreme Court of the United States

KHALED A.F. AL ODAH, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF INTERNATIONAL LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT OMAR KHADR

SARAH H. PAOLETTI
UNIVERSITY OF PENNSYLVANIA
SCHOOL OF LAW
3400 CHESTNUT STREET
PHILADELPHIA, PA 19104
(215)898-8427

Counsel of Record for Amici Curiae

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Pursuant to Rule 37.3(b) of the Rules of the Supreme Court of the United States, International Law Scholars (listed in Appendix A) hereby request leave to file the accompanying *amicus curiae* brief. This brief is submitted in support of the petition for writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit. Petitioners and Respondents Khadr and Khalid have consented to the filing of this brief. Counsel for Respondent President Bush has not consented.

As set forth in the accompanying brief, the International Law Scholars listed in Appendix A are committed to the respect for international humanitarian,

human rights and criminal law, and have a deep interest in seeing that said legal norms are followed.

The International Law Scholars seeking to appear as *Amici* do so because of their great concern alternative process to habeas corpus provided for under the Military Commissions Act is inadequate for preserving well-established principles of international law. Specifically, *Amici* urge this Court to consider that the United States' position regarding the detention and prosecution of Omar Khadr before the Combatant Status Review Tribunals is in stark contrast to well-established precedent under customary international law which prohibits the prosecution of children alleged to have engaged in combat except in extraordinary cases. In those cases where such prosecutions are allowed, international law requires children be treated with special protections and with an eye towards rehabilitation and reintegration, and not retribution. Accordingly, the International Law Scholars listed in Appendix A respectfully request leave to file the accompanying *amicus curiae* brief.

August 23, 2007

Respectfully submitted,

SARAH H. PAOLETTI*
Counsel of Record for
International Law Scholars
UNIVERSITY OF PENNSYLVANIA
SCHOOL OF LAW
3400 Chestnut Street
Philadelphia, PA 19104
(215)898-8427

* Application for Admission to the U.S. Supreme Court pending

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INTEREST OF *AMICI CURIAE*

Amici Curiae are international law scholars and experts in the area of international humanitarian law, international criminal law and international human rights law.[1] They submit this brief in support of Petitioners and Respondent Omar Khadr based on their firm belief that the alternative process to habeas corpus provided for under the Military Commissions Act is inadequate for preserving well-established principles of international law. Specifically, *Amici* urge this Court to consider that the United States' position regarding the detention and prosecution of Omar Khadr before the Combatant Status Review Tribunals is in stark contrast to well-established precedent under customary international law which prohibits the prosecution of children alleged to have engaged in combat except in extraordinary cases. In those cases where such prosecutions are allowed, international law requires children be treated with special protections and with an eye towards rehabilitation and reintegration, not retribution.

SUMMARY OF ARGUMENT

It is a principle of customary international law that children are to be accorded special protections in all criminal proceedings, and in any prosecutions for participation in warlike acts. This principle also holds true under international humanitarian law which affords special

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[1] Names and statements of interest of the individual *amici* are provided in the attached Appendix. This brief was authored by the *amici* and counsel listed on the front cover, and was not authored in whole or in part by counsel for a party. No one other than *amici* or their counsel made any monetary contributions to the preparation or submission of this brief.

status to children in armed conflict and recognizes the need to distinguish them once captured. In appreciation of the unique issues related to children in armed conflict, no international criminal tribunal established under the laws of war, from Nuremberg forward, has prosecuted a former child soldier for violating the laws of war. To the extent that international law recognizes the limited culpability of children as combatants, it does so with an eye towards rehabilitation and reintegration, and not punishment. The alternative procedures established under the Military Commissions Act in lieu of habeas corpus have failed to provide the minimum guarantees afforded to children under clearly established international law norms applicable to the United States.

ARGUMENT

I. THE RIGHTS OF THE CHILD TO PROTECTED STATUS IN SITUATIONS OF ARMED CONFLICT IS A CUSTOMARY NORM OF INTERNATIONAL LAW

Norms of international law require that children (all persons under the age of 18) be provided with special rights and protections. These include specific norms governing the protection and treatment of children in armed conflict and children accused of having engaged in warlike activities. The development of these norms began in 1924 with provisions included in the Geneva Declaration,[2] and reiterated in 1959 in the Declaration of the Rights of the

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[2] Geneva Declaration of the Rights of the Child, Sept. 26, 1924, League of Nations, O.J. Spec. Supp. 21 at 43 (1924) (providing that "The child must be the first to receive relief in times of distress" and "must be protected against every form of exploitation.").

Child enumerating ten principles of special attention to the child as a vulnerable person, who by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. Doc. A/4354 (Nov. 20, 1959). The prohibition of the recruitment or use of child soldiers, the requirement that illegally recruited child soldiers be treated as victims, and the prohibition of the retributive prosecution of child soldiers absent extraordinary circumstances are well enshrined in international treaty law and supported by sufficient state practice and *opinio juris* that they should be recognized as part of customary international law and, hence, as binding on the United States.[3]

International humanitarian law definitively recognizes the need to protect children, especially from the

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[3] *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); *United States v. Arjona*, 120 U.S. 479, 487 (1887) ("A right secured by the law of nations to a nation or its people is one the United States, as the representatives of this nation, are bound to protect."); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987).International law, also referred to as "the law of nations," has as its source international conventions, international custom or state practice as evidence of a general practice of law, general principles of law accepted by civilized nations, judicial decisions, and the opinions of eminent scholars in the field. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980). "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61 (1820), *Id.* See also, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761 (2004) (international law includes "norm[s] of international character accepted by the civilized world").

horrors of war, and to provide redress for those horrors once the children have been removed from the conflict. Child-related provisions of the 1949 Geneva Conventions, recognized as binding in customary international law, provide repeatedly for age as a reason for privileges.[4]

The 1977 Additional Protocol to the Geneva Conventions further establishes "children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason." Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), June 8, 1977, 1125 U.N.T.S. 3, Art. 77(1).

The principle of special care for children is extended to non-international armed conflicts in Article 4(3) of Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, wherein child combatants,

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[4] Geneva Convention III Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135, Art. 16 (creating a position exception from equality accorded by reason of age) and Art. 49 (requiring age differentiation); Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, Art. 24 (outlining specific provisions for children under 15), Art. 50 (outlining specific obligations of occupying powers vis-à-vis children), Art. 51 (excluding persons under 18 from any circumstances that might necessitate them to be enlisted and compelled to labour by an occupying power) and Art. 68 (excluding children who were under 18 at the time of the offence committed from the death penalty).

particularly if illegally recruited, are entitled by virtue of their age to protections above and beyond those to which any similarly situated adult is entitled.

The 1989 U.N. Convention of the Rights of the Child (the "CRC"), defining a child as "every human being below the age of eighteen years," G.A. Res. 44/25, U.N. Doc. A/44/49 (Nov. 20, 1989), establishes the centrality of the survival and development of children, and articulates three major principles: (1) non-discrimination; (2) children's participation; and (3) the best interests of the child. *Id.*, Art. 1. Included in the CRC are specific provisions relating to armed conflict, *id.*, Arts. 38-39, which grant full recognition to the rules of international humanitarian law as they pertain to children, and call upon States Parties "to promote physical and psychological recovery and social reintegration" in "an environment which fosters the health, self-respect and dignity of the child." *Id.*, Art. 39.[5]

The 2005 World Summit Outcome Document, U.N. Doc. A/RES/60/1 (Oct. 24, 2005), called upon States to take effective measures to prevent the recruitment and use of children in armed conflict by armed forces and groups, to prohibit and criminalize such practices, and to "ensure that children in armed conflicts receive timely and effective humanitarian assistance, including education, for their rehabilitation and reintegration into society." *Id.* at ¶¶ 117-118.

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[5] Similar provisions are articulated in Article 40 of the CRC pertaining to treatment of juveniles under penal law.

II. INTERNATIONAL LAW PRESUMES A CHILD WHO HAS SERVED IN CIRCUMSTANCES SIMILAR TO THAT OF RESPONDENT WAS RECRUITED ILLEGALLY AND SERVED INVOLUNTARILY

A. International law restricts the recruitment and use of child soldiers in hostilities.

International law increasingly restricts the recruitment and use of child soldiers, with a prohibition on the recruitment and use of all children under fifteen for active participation in hostilities, and a prohibition on the forcible or compulsory recruitment of children aged between fifteen and eighteen years, who even if voluntarily recruited may not be used to participate directly in hostilities. Although children between 15 and 18 may volunteer for military service for the State, international law imposes strict criteria to ensure that such enlistments are the result of the child's (and his or her parents') informed consent. All recruitment into non-governmental armed groups is prohibited and deemed not to be truly voluntary.

The prohibition of the recruitment and use of children under 15 to participate actively in hostilities is both a treaty rule and a rule of customary international law. Article 77 of Protocol I prohibits the recruitment of children under fifteen into armed forces and their direct participation in hostilities in international armed conflicts.[6] Similarly, Article 4(3)(c) of Protocol II prohibits the recruitment of children under fifteen into armed forces or groups or their participation in hostilities in non-

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[6] 1125 U.N.T.S. 3

international armed conflicts.[7] Article 38(2) of the CRC requires all states "ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities," and Article 38(3) obliges states to "refrain from recruiting any person who has not attained the age of fifteen years into their armed forces."[8] These texts are derived directly from Article 77(2) of the 1977 Additional Protocol to the Geneva Conventions, which was used as the benchmark from which discussion on the CRC commenced, even by States which had not ratified or signed the Additional Protocol.[9]

For children between the ages of fifteen and eighteen, Article 3 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict imposes restrictions on the voluntary recruitment of children, obliging states to maintain safeguards to ensure, as a minimum: a) such recruitment is genuinely voluntary; b) is carried out with the informed consent of the person's parents or legal guardians; c) such persons are fully informed of the duties involved in such a military service; and d) they provide reliable proof of age

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[7] 1125 U.N.T.S. 609

[8] U.N. Doc. A/44/49

[9] Matthew Happold, CHILD SOLDIERS IN INTERNATIONAL LAW (2005), pp. 89-91. Indeed, in 1987 the then Deputy Legal Adviser to the State Department, explaining that whilst the U.S. Government was unwilling to ratify the 1977 Additional Protocol, it saw a number of its provisions as reflecting customary international law, including "the principle ... that all feasible measures be taken in order that children under fifteen do not take a direct part in hostilities." Michael J. Matheson, *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415 (1987) at 421.

prior to acceptance into national military service. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, GA Res. 54/263, U.N. Doc. A/RES/54/49, Annex I (May 25, 2000) ("Child Soldier Protocol").[10]

All recruitment of child soldiers by non-State armed groups is presumed to be involuntary and, as such, illegal. Article 4 of the Child Soldier Protocol prohibits non-State armed groups to, "under any circumstances, recruit or use in hostilities persons under the age of 18 years." This total prohibition, in contrast to the partial prohibition on the recruitment and use of child soldiers imposed by the Child Soldier Protocol for participation in government-sponsored military service, is justified because non-State groups cannot be parties to the Protocol. In consequence, the existence and effectiveness of any safeguards they claim to apply to ensure that the recruitment of child soldiers into their ranks is based on the child's (and his or her parents') informed consent cannot be monitored.

International law actively disfavours children's involvement in armed conflict, even where that participation occurs through arguably lawful recruitment and it severely restricts the recruitment of children and their use to participate in hostilities. Both Protocol I and the CRC require that in recruiting among children who have attained the age of 15, but who have not yet attained the age of 18, States shall endeavour to give priority to

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[10] The United States signed the Protocol on July 5, 2000, and ratified it on December 23, 2002. There are 117 parties to the Protocol, and 122 signatories. http://www.ohchr.org/english/countries/ratification/11_b.htm (last updated July 13, 2007).

those who are oldest. Indeed, international law may be moving towards prohibiting all recruitment and use of child soldiers.[11]

B. Children illegally recruited into armed conflict are deemed to have served involuntarily and therefore should be treated as victims, not perpetrators.

In most cases, children recruited into armed conflict are treated as victims of a war crime; in all cases, they are viewed as victims of human rights violations.[12] This status is firmly supported by international treaty law. The CRC and the Child Soldier Protocol are human rights treaties conferring individual entitlements on those persons (i.e. children) which they seek to protect. Article 3 of ILO Convention 182 goes so far as to define the forced or compulsory recruitment of children for use in armed

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[11] The 1990 African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), to which 39 African States are parties, requires that parties: "ensure that no child shall take a direct part in hostilities and refrain in particular from recruiting any child." Art. 22(2).

In 1995, the 26th International Conference of the Red Cross and Red Crescent adopted a plan of action, which (Commitment 1) committed it to promoting the non-recruitment and non-participation in armed conflict for all children under the age of 18.

[12] The 1993 Vienna World Conference on Human Rights initiated a study on the impact of armed conflict on children, which resulted in Graça Machel's 1996 Report, *Promotion and Protection of the Rights of Children: Impact of armed conflict on children,* a shocking revelation of horrific abduction and recruitment of child soldiers, sexual exploitation and other appalling crimes against children. U.N. Doc. A/51/306 (Aug. 26, 1996). The Report reiterated the need for reintegration of child soldiers put forth in the CRC, and articulated specific guidelines regarding the means by which to achieve that reintegration.

conflict as a form of slavery or a practice similar to slavery. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO C182), June 17, 1999, 38 I.L.M. 1207 at Art. 3.[13] It is not only the act of illegal recruitment that violates a child's rights, but also his or her retention in an armed force or group into which he or she has been illegally recruited. In consequence, the war crime of child recruitment is a continuing crime.[14]

Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute of the International Criminal Court respectively list "[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" in international and non-international armed conflicts and "[c]onscripting or enlisting children under the age of fifteen into armed forces or groups or using them to participate actively in hostilities" in non-international armed conflicts as war crimes within the jurisdiction of the International Criminal Court. U.N. Doc. A/CONF.183/9 (July 17, 1998). Individual criminal liability for recruitment of children in an armed conflict has also been seen in international criminal tribunals created under the auspices of the United Nations, such as the Special Court for Sierra Leone.[15]

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[13] The United States ratified the Convention 182 on December 2, 1999. 165 countries have ratified the Convention. http://www.ilo.org/ilolex/

[14] See *Prosecutor v Thomas Lubanga Dyilo*, Decision on the confirmation of charges, Pre-Trial Chamber I, International Criminal Court, 29 January 2007, ICC-01/04-01/06-803, para. 248.

[15] Article 4(c) of the Statute of the Special Court for Sierra Leone (SCSL) incorporates Article 8(2)(e)(vii) of the Rome Statute word for word. U.N. Doc. S/RES/1315 (Aug. 14, 2000). All the defendants before the Special Court have been indicted for the war crime of child recruitment. In

The first prosecutions undertaken by the International Criminal Court confirm that international law treats children —even those who may commit crimes in the context of armed conflict—as victims of the conflict, rather than legally responsible actors. The ICC's first active prosecution, The Prosecutor v. Thomas Lubanga Dyilo, charges him with the war crime of "enlisting children under the age of fifteen" and "using children under the age of fifteen to participate actively in hostilities."[16] The ICC Prosecutor, Luis Moreno Ocampo confirmed that the case was intended to address "serious crimes against children. Child conscription destroys the lives and futures of thousands of children around the world. This case will contribute to exposing the problem and in stopping these criminal practices."[17] Notably, neither the International Criminal Court nor other international criminal tribunals have sought to hold the child soldiers who were recruited in

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Prosecutor v. Samuel Hinga Norman, the Special Court's Appeals Chamber ruled that enlisting child soldiers had been prohibited in customary international law and incurred individual criminal responsibility prior to the adoption of the Rome Statute, at least from the start of the SCSL's temporal jurisdiction in November 1996. *Prosecutor v. Norman*, SCSL-04-14-AR72(E) (May 31, 2004), Decision on preliminary motion based on lack of jurisdiction (child recruitment), May 31, 2004. See also, *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T, Trial Chamber II, Special Court for Sierra Leone (June 20, 2007) (finding all three accused guilty of child recruitment); and, *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T, Trial Chamber I (August 2, 2007) (finding Defendant Kondewa guilty of child recruitment).

[16] Situation in the Democratic Republic of the Congo, The Prosecutor v. Thomas Lubanga Dyilo, Warrant of Arrest of 10 February 2006. See also, *Prosecutor v. Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen*, Indictment, ICC-02/04-01/05.

[17] International Criminal Court Press Release, Child Soldier Charges in the First International Criminal Court Case, 28 August 2006, ICC-OTP-20060828-157-En

these conflicts responsible for any crimes they may have committed on the battlefield.

III. INTERNATIONAL CUSTOMARY LAW AND POLICY CLEARLY DISFAVOURS THE PROSECUTION OF CHILD SOLDIERS FOR THEIR WARLIKE ACTS, RECOGNIZING CHILD SOLDIERS AS VICTIMS AND NOT PERPETRATORS

International law generally precludes the prosecution of child soldiers before war crimes tribunals, unless the exercise of criminal jurisdiction is intended to serve a rehabilitative function. This is particularly true for child soldiers who have been unlawfully recruited and whom international law categorizes as victims, requiring them to be treated in such a manner as to promote their rehabilitation and reintegration into society.[18] Accordingly, rehabilitation, not retribution, should be the purpose of any proceedings taken against or sanctions imposed on a child soldier.

To date, there is no precedent for the prosecution of a child solder before an international criminal tribunal. In those instances where international tribunals or semi-internationalized domestic courts operating in post-conflict settings do allow for the exercise of criminal jurisdiction over minors under the age of eighteen, they make clear that such prosecutions must recognize the special status of minors and should be intended for educational or rehabilitative purposes.

A. International law presumes that child soldiers are not triable absent extraordinary circumstances, and there is no precedent under

[18] See discussion, *infra*, Section II.

> international law for the prosecution of individuals who engaged in conflict when they were under the age of eighteen.

Although international law does not entirely preclude the exercise of jurisdiction over child soldiers by law of war tribunals, it is clear that, absent exceptional circumstances and rehabilitative intent, it disfavours such prosecutions. Even when the tribunal's statute permits such prosecutions, examination of the practices of international law of war tribunals provides no precedent for any person being tried before an international law of war tribunal for offences committed prior to his or her eighteenth birthday.

(1) The International Criminal Court

The tendency towards an international legal status of minors as exempt from criminal liability and prosecution for war crimes is underscored by the treatment of minors in the Rome Statute of the International Criminal Court. This treaty is the most recent and comprehensive international agreement with respect to liability for international crimes. It provides expressly at Article 26 that "The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime."[19] During the drafting of the Rome Statute, numerous proposals were made for varying ages of criminal responsibility which reflected different approaches taken in different countries. These discussions resulted ultimately in the exclusion of jurisdiction for those under eighteen. According to the discussion of the drafting history of Article 26 in the Commentary on the Rome Statute of the International

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[19] U.N. Doc. A/CONF.183/9 (July 17, 1998), 2187 U.N.T.S. 90, at Article 26.

Criminal Court, "under *international* law criminal responsibility begins at the age of eighteen, because according to all these laws no one under the age of 18 was charged with any crime by any of the Nuremberg Courts."[20]

(2) The Special Panels for Serious Crimes Established by the United Nations Transitional Authority in East Timor

The legislation establishing the Special Panels for Serious Crimes operated under the auspices of the United Nations Transitional Authority in East Timor provides special protections related to the prosecution of minors. While it allows that "A minor between 12 and 16 years of age may be prosecuted for criminal offences only in accordance with such rules as may be established in subsequent UNTAET regulations on juvenile justice,"[21] those regulations further provides that any prosecution of a minor under the age of 16 must be in "accord with the United Nations Convention on the Rights of the Child, and shall consider his or her juvenile condition in every decision made in the case."[22] The UN Convention on the Rights of the Child, in turn, provides that measures relating to children in armed conflict should be intended "to promote physical and psychological recovery and social reintegration".[23]

(3) The Extraordinary Chambers in the Courts of Cambodia

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[20] Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Otto Triffterer, ed., (1999) at 494.
[21] United Nations Transitional Authority in East Timor, Regulation 2000/30, art 45.1
[22] Id., at Art. 45.4
[23] U.N. Doc. A/44/49, Art. 39.

The legislation establishing the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea essentially precludes the exercise of jurisdiction over minors, despite the fact that numerous international crimes were committed by minors during the conflict.[24] The Cambodian legislation limits jurisdiction to "those who were most responsible" for crimes during the Period of Democratic Kampuchea, thereby precluding the prosecution of minors who were mere perpetrators of such crimes.[25] Should a minor have been among those most responsible, the purpose of any prosecution would nonetheless have to be rehabilitative. Article 33 of the Cambodian legislation provides: "The Extraordinary Chambers of the trial court shall exercise their jurisdiction in accordance with international standards of justice, fairness and due process of law, as set out in Articles 14 and 15 of the 1966 International Covenant on Civil and Political Rights"[26] Article 14 of the ICCPR, in turn, stipulates that criminal process over minors persons must "take account of their age and the desirability of promoting their rehabilitation."[27] Hence, any exercise of criminal jurisdiction over minors by the court should be intended to promote rehabilitation rather than retributive punishment.

(4) The Special Court for Sierra Leone

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[24] Meng Try Ea & Sorya Sim, Victims and Perpetrators The Testimony of Young Khmer Rouge Cadres at S-21 (2001) (documenting crimes in Khmre Rouge Cambodia by minors).

[25] Law on the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, (NS/RKM/1004/006), art 1.

[26] *Id.*, art 33.

[27] International Covenant on Civil and Political Rights, Art. 14(4).

Although the Statute of the SCSL does provide the Court jurisdiction over children between the ages 15 and 18, it requires that juvenile offenders be treated differently than adults.[28]. The drafting history makes clear the provision related to juvenile offenders was retained only because the Statute left to the Court's Prosecutor, rather than its founders, the determination of who bore the greatest responsibility for the crimes committed during the conflict in Sierra Leone and who should consequently be prosecuted before the Special Court. The large number of child soldiers who actively participated in the conflict in Sierra Leone required, however unlikely, for provisions related to how those children were to be treated should the Court's Prosecutor ultimately decide to prosecute them.[29] The view of the United Nations Security Council, however, was that child soldiers were more appropriately dealt with by other accountability mechanisms, such as the Sierra Leone Truth and Reconciliation Commission.[30] Moreover, following the Special Court's establishment, its first Prosecutor, Mr David Crane, announced that he did not intend to charge anyone for crimes committed whilst they were under the age of 18 and no such charges have been brought.[31]

(5) The Tribunals for the former Yugoslavia and Rwanda

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[28] U.N. Doc. S/RES/1315 (Aug. 14, 2000) at Arts. 7(1)-7(2).

[29] Letter dated 12 January 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/40, at 1.

[30] Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, at 1.

[31] *See* Special Court for Sierra Leone Public Affairs Office, "Special Court Prosecutor Says He Will Not Prosecute Children", 2 November 2002, available at http://www.sc-sl.org/Press/pressrelease-110202.pdf.

The Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda do not include any provisions governing the age of criminal responsibility.[32] This omission was deliberate and marked a belief that should the court seek to exercise jurisdiction over a minor, that minor could raise his or her age as an affirmative defense.[33] In confirmation of this belief, neither tribunal has brought any such prosecution.

(6) The State Court of Bosnia and Herzegovina

The recently established State Court of Bosnia and Herzegovina includes a Special Chamber for War Crimes to prosecute war crimes cases not addressed by the ICTY. The Court was created with assistance and aid from the international community, including the United States and the United Nations. The Criminal Code of Bosnia and Herzegovina provides an absolute bar on the prosecution of

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[32] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993). Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (1994).

[33] *See* Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution No. 808 (1993), UN Doc. S/2570, para. 58. (stating that the "International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations").

minors below the age of 14.[34] The Code provides that with respect to minors "who at the time of perpetration of a criminal offence had attained fourteen years of age but had not reached sixteen years of age (a junior juvenile) only educational measures may be imposed."[35] The "educational recommendations" available to the War Crimes Chamber must be specifically designed for the purposes of rehabilitation and "to avoid initiation of criminal procedures against juvenile perpetrators."[36]

The statutes and authorizing legislation governing present international or semi-internationalized criminal tribunals make clear a progression toward the restriction of criminal prosecution of minors. Absent specific provision in the statute of a law of war tribunal permitting the rehabilitative exercise of criminal jurisdiction, international law precludes prosecution.

B. The presumption that prosecutions against child soldiers should not be brought absent extraordinary circumstances is a corollary to the belief the child soldiers are themselves victims in need of rehabilitation and reintegration into society.

While the exercise of criminal jurisdiction over minors is not formally barred by international law, should a war crimes tribunal seek to exercise jurisdiction over a minor it must do so with rehabilitative, not retributive intent. This principle of international law is evidenced by the inclusion of provisions in the recent Paris Principles and

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[34] Criminal Code of the Federation of Bosnia & Herzegovina, Art. 8.
[35] Id., at Art 80.
[36] Id., at Art. 77.

Guidelines on Children Associated with Armed Forces or Armed Groups (the "Paris Principles") stating: "Children should not be prosecuted by an international court or tribunal" and "[a]lternatives to judicial proceedings should be sought for children at the national level." Paris Principles, February 2007, §§ 8.6, 8.9.0.[37]

Article 39 of the CRC requires States to "take all appropriate measures to promote physical and psychological recovery and social reintegration" of child victims of "any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts." [38] Such recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child. Article 6 of the Child Soldier Protocol obliges States to take all feasible measures to ensure that children illegally recruited or used in hostilities are demobilized and accorded all appropriate assistance for their physical and psychological recovery and social reintegration.[39]

In February 2007, by approving the Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, some 58 States expressly committed themselves:

> To ensure that children under 18 years of age who are or have been unlawfully recruited or used by

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[37] Text available at http://www.unicef.org/infobycountry/files/ParisPrinciples310107English.pdf.

[38] U.N. Doc. A/44/49, Art. 39.

[39] U.N. Doc. A/RES/54/263, Art. 6.

> armed forces or groups and are accused of crimes against international law are considered primarily as victims of violations against international law and not only as alleged perpetrators. They should be treated in accordance with international standards for juvenile justice, such as in a framework of restorative justice and social rehabilitation.

Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups, consolidated version, ("Paris Commitments"), Principle 11. [40] Another corollary, however, as the Paris Commitments also indicate, is that compliance with the international standards relating to juvenile justice is a condition with which any law of war tribunal must comply in order to exercise jurisdiction over child soldiers.

The United States itself has recognized the importance of programs aimed towards reintegration and rehabilitation, noting in its Initial Report under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: "The United States has contributed substantial resources to international programs aimed at preventing the recruitment of children and reintegrating child ex-combatants into society and is committed to continue to develop rehabilitation approaches that are effective in addressing this serious and difficult problem."[41] The United States

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[40] Text available at http://www.unicef.org/protection/files/ParisCommitments120207english.pdf.

[41] Initial Report of the United States of America to the UN Committee on the Rights of the Child Concerning the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, U.N. Doc. CRC/C/OPA/USA/1 (22 June 2007), para. 34.

further noted that is has contributed, through the U.S. Agency for International Development, over $10 million towards the demobilization of child combatants and their reintegration into society, outlining programs in seven different countries, Afghanistan included among them.[42]

C. International law requires that trials of child soldiers be subject to specific minimum safeguards

The statutes of the international tribunals discussed above illustrate the universal recognition that children are subject to minimum safeguards in those limited instances where they are subject to prosecutorial jurisdiction. Article 7 of the SCSL Statute provides, *inter alia*, that:

> 1. ... Should any person who was at the time of the alleged commission of the crime between 15 and 18 years of age come before the Court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international *human rights standards, in particular the rights of the child.*
>
> 2. In the disposition of a case against a juvenile offender, the Special Court shall order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate,

[42] Id., at para. 35.

> any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies. (emphasis added).

The Statute reflects the requirement that when dealing with child soldiers the primary objective must be to ensure their rehabilitation and reintegration into society (*see* § III.B above). Any prosecution must be consistent with the State's obligation to rehabilitate and reintegrate the child soldier into society both as regards process and outcome. The reference to "human rights standards, in particular the rights of the child" incorporates by reference the relevant provisions of the CRC on the rights of children criminal proceeding, requiring that every child accused of having breached the criminal law benefits from certain minimum safeguards.[43]

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[43] Article 40(2)(b) of the CRC provides the following minimum rights: (i) To be presumed innocent until proven guilty according to law; (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence; (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians; (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality; (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law; (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used; (vii) To have his or her privacy fully respected at all stages of the proceedings.

More recently, the Paris Principles reflect the same assumption, providing that: if national criminal proceedings are to be taken against children accused of crimes allegedly committed while associated with armed forces or groups, they are "entitled to the highest standards of safeguards available according to international law and standards." Paris Principles §§ 8.8, 8.9.1. Any such children-specific minimum safeguards are, of course, additional to safeguards that international law guarantees to all similarly situated defendants.

D. International law also disfavours prosecuting adults for crimes committed when child soldiers

International law views children as only relatively responsible for the crimes they commit because of their lack of psychological maturity and susceptibility to negative influences and external pressures at the time they committed the crimes.[44] Because their personalities are not yet fully formed, use of the criminal process against an individual who has attained the age of majority subsequent to the commission of the acts for which he is prosecuted must be directed towards their rehabilitation rather than retribution for their crimes. A person cannot be held fully responsible for a crime if he or she was not fully responsible at the time he or she committed it. The Rome Statute of the International Criminal Court specifically provides for this contingency,

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[44] As the Supreme Court explained in *Roper v. Simmons*, 543 U.S. 551, 570 (2005): "The susceptibility of juveniles to immature and irresponsible behaviour means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' (citation omitted)."

prohibiting the prosecution of individuals who are alleged to have committed crimes before their eighteenth birthday.[45]

Similarly, Article 7(1) of the Statute of the SCSL, which does allow for the Special Prosecutor to charge child soldiers, only covers an individual "who was at the time of the alleged commission of the crime between 15 and 18 years of age," and special protections are provided to persons who were under 18 at the time of the commission of the acts for which they are charged, regardless of their age when they are called to appear before the Special Court. The drafting of Article 7 to protect all persons who committed crimes when they were children, regardless of their age when they appeared before the Special Court, was deliberate.[46] Accordingly, a defendant who is now an adult but who was a child soldier at the time he or she allegedly committed war crimes continues to benefit from the protections international law accords accused child soldiers.

CONCLUSION

International human rights and humanitarian law has evolved to ensure that children are accorded protected status. In recognition of the limitations on a child's ability to consent to recruitment and use in armed conflict, international law imposes restrictions both on the recruitment and use of children in armed conflict, as well as on the prosecution of child soldiers for their warlike activities. To date, no international tribunal has prosecuted an individual for acts committed when that individual was still a minor; instead,

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[45] U.N. Doc. A/CONF.183/9, Art. 26.

[46] *See* Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, UN Doc. S/2000/1234, Annex, Art. 7.

international law aims to rehabilitate and reintegrate children. Respondent Omar Khadr's case demonstrates that the denial of habeas corpus to Petitioners will result in the United States' ongoing detention and prosecution of an individual alleged to have engaged in combat as a child in stark opposition to long-standing and well-established precedent under international law protecting the rights of children recruited into armed conflict. *Amici* therefore urge this Court to grant Petitioners' request for relief.

Dated: August 23, 2007

Respectfully submitted,

Sarah H. Paoletti (PA Bar No. 83036)
Application for Admission to
U.S. Supreme Court Pending
University of Pennsylvania
School of Law
3400 Chestnut Street
Philadelphia, PA 19104
Phone: (215) 898-8427

William Burke-White is an Assistant Professor of Law at the University of Pennsylvania. Before that he was Lecturer in Public and International Affairs and Senior Special Assistant to the Dean, Woodrow Wilson School of Public and International Affairs, Princeton University. He received his Ph.D. & M.Phil from Cambridge (where he was a Fulbright Scholar), and his J.D. from Harvard in 2002. Burke-White has served as Visiting Scholar at the International Criminal Court and as Law Clerk at the International Criminal Tribunal for the Former Yugoslavia. He has also advised the US State Department and the Government of the Democratic Republic of Congo on international criminal accountability in the Congo and has worked with the UN Transitional Administration in East Timor on the Special Panels for Serious Crimes in East Timor. Burke-White has published a number of articles on international criminal law in the Harvard International Law Journal, the Michigan Journal of International Law, and the Leiden Journal of International Law (Netherlands).

John Cerone is a Professor of Law New England School of Law, where he teaches Public International Law, Human Rights Law, and International Criminal Law, and serves as director of the law school's Center for International Law and Policy. He has been a fellow at the Max Planck Institute for Comparative Public Law and International Law, and a visiting scholar at the International Criminal Court. Before joining the New England faculty in 2004, Professor Cerone was executive director of the War Crimes Research Office at American University Washington College of Law, where he served as a legal adviser to various international criminal courts and tribunals. He has extensive field experience in conflict and post-conflict environments, such as Afghanistan, Kosovo, Sierra Leone, and East Timor. He is accredited by the United Nations to represent the

American Society of International Law before various U.N. bodies. Prof. Cerone is author of several articles and book chapters on international law and the law of armed conflict.

Professor Roger S. Clark is a Board of Governors Professor at Rutgers Law School, Camden, New Jersey, where he has taught International Law and Criminal Law since 1972. He is a graduate of Victoria University of Wellington, in New Zealand (B.A., LL.B., LL.M., LL.D.) and Columbia University School of Law (LL.M., J.S.D.). In 1984-85, as a consultant to the Crime Prevention and Criminal Justice Branch of the United Nations Secretariat, he was one of the drafters of the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. Between 1987 and 1990, he was a member of the former U.N. Committee on Crime Prevention and Control. He represented Samoa at the Preparatory Committee that led to the 1998 Rome Diplomatic Conference on the Establishment of an International Criminal Court, at the Conference in Rome, at the Preparatory Commission for the Court, and at the Assembly of States Parties of the Court. He currently represents Samoa at the ICC's Special Working Group on the Crime of Aggression. He has written numerous books and articles on issues of human rights, decolonization and international criminal law.

David M. Crane is a Distinguished Professor of Law at Syracuse University Law School and former Chief Prosecutor for the Special Court for Sierra Leone. He had formerly served over 30 years in the US federal government. Appointed to the Senior Executive Service of the United States in 1997, he held numerous key managerial positions, including serving as a Senior Inspector General, Department of Defense; Assistant General Counsel of the Defense Intelligence Agency; and

Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School.

Martin Flaherty is Co-Director of the Crowley Program in International Human Rights and Leitner Family Professor of International Human Rights at Fordham Law School in New York City and Visiting Professor, Woodrow Wilson School of Public & International Affairs at Princeton. He is also former Chair of the International Human Rights Committee of the New York City Bar Association.

Guy S. Goodwin-Gill is a Barrister, Blackstone Chambers, and Senior Research Fellow of All Souls College and Professor of International Refugee Law at the University of Oxford. His publications include The Refugee in International Law, Oxford: Oxford University Press, 3rd ed. (with Jane McAdam), 2007; Free and Fair Elections, Geneva: Inter-Parliamentary Union, 2nd ed., 2006; Basic Documents on Human Rights, with Ian Brownlie, eds., Oxford: Oxford University Press, 5th ed., 2006; Child Soldiers: The Role of Children in Armed Conflict, (with Ilene Cohn), Oxford: Clarendon Press, 1994.

Matthew Happold is Reader in Law at the University of Hull. He previously taught at the universities of Sussex and Nottingham. In 2004, he was a Visiting Fellow at the Human Rights Program, Harvard Law School and a Visiting Professional in the Office of the Prosecutor of the International Criminal Court. Matthew is the author of Child Soldiers in International Law (Juris Publishing: 2005) and of numerous journal articles and book chapters on children and armed conflict. He also practices as a Barrister from 3 Hare Court, London.

Jordan Paust is the Mike and Teresa Baker Law Center Professor at University of Houston Law Center, where he has served on the faculty since 1975 as an International Law expert. He was a Fulbright Professor at the University of Salzburg (Austria), a Ford Foundation Fellow at Yale University and visiting Ball Eminent Scholar University Chair at Florida State University. Professor Paust has written several books and over 150 articles and essays addressing a wide array of international legal issues. He has served in numerous leadership capacities in local, national and international groups dealing with International Law, Human Rights, and International Criminal Law. He has chaired the International Law Section of the Association of American Law Schools and the Committee on International Law and the Use of Force of the ABA. He has also served on the President's Committee and Executive Council of the American Society of International Law and is currently Co-Chair of the ASIL's International Criminal Law Interest Group. His publications have been cited by the U.S. Supreme Court, other courts, and international tribunals.

Vesselin Popovski is Senior Academic Programme Officer, Director of Studies on International Order and Justice, UNU, Tokyo. His most recent book is International Criminal Accountability and the Rights of Children (Hague Academic Press, 2006), and he was co-author of the "Princeton Principles of Universal Jurisdiction" (2001). From 2002 until 2004 worked as a human rights expert in Russia for the European Union Project "Legal Protection of Individual Rights in Russia".

Jaya Ramji-Nogales is an Assistant Professor of Law at Temple University's Beasley School of Law, where she teaches Civil Procedure, Evidence, and Transitional Justice. Prof. Ramji-Nogales received her BA with highest honors

and distinction from the University of California at Berkeley; her JD from the Yale Law School; and her LLM with distinction from the Georgetown University Law Center. Her publications in the field of international criminal law include *Reclaiming Cambodian History: The Case for a Truth Commission*, 24 FLETCHER FORUM OF WORLD AFFAIRS 137 (2000) and BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS (co-edited with Beth Van Schaack) (Mellen Press 2005). Prof. Ramji-Nogales has also acted as a Legal Advisor to the Documentation Center of Cambodia since 1997.

Sonia E. Rolland is a Lecturer at the University of Michigan Law School where she teaches public and private international law. Her research focuses on public international law. She earned her J.D. degree from the University of Michigan Law School in 2003 and practiced law at Sutherland Asbill & Brennan LLP in Washington, DC. She served as a clerk at the International Court of Justice for President Gilbert Guillaume and Judge Ronny Abraham. Pr. Rolland has published on various aspects of international law in the Harvard International Law Journal, the Michigan Journal of International Law, the Georgetown Immigration Law Journal and the European Journal of International Law. Some of her research findings have recently been endorsed by the International Law Commission in a report to the United Nations General Assembly. Prof. Rolland's comment on Rasul v. Bush, 542 U.S. 466 (2004) and Rumsfeld v. Padilla, 542 U.S. 426 (2004) appeared in the Global Community Yearbook of International Law and Jurisprudence.

Professor Sadat is the Henry H. Oberschelp Professor of Law at the Washington University School of Law and the Director of the Whitney R. Harris Institute of Global Legal

Studies. She is an expert on the International Criminal Court, and was a delegate to the U.N. Preparatory Committee and to the 1998 diplomatic conference in Rome at which the Court was established. She has published a series of articles on the Court and an award-winning monograph, "The International Criminal Court and the Transformation of International Law," supported by a grant from the U.S. Institute of Peace. From May 2001 until September 2003, she served on the nine-member U.S. Commission for International Religious Freedom. Prof. Sadat currently serves as Secretary of the American Society of Comparative Law, Vice-President of the International Law Association (American Branch) and the International Association of Penal Law (AIDP), and is a member of the American Law Institute. Sadat has also served as a member of the Executive Council, Executive Committee and Awards Committee for the American Society of International Law.

Michael Scharf is Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law. During the first Bush and Clinton Administrations, Professor Scharf served in the Office of the Legal Adviser of the U.S. Department of State, where he held the positions of Counsel to the Counter-Terrorism Bureau, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations General Assembly and to the United Nations Human Rights Commission. Professor Scharf is the author of over sixty scholarly articles and ten books, including Balkan Justice, which was nominated for the Pulitzer Prize in 1998, The International Criminal Tribunal for Rwanda, which was awarded the American Society of International Law's book of the Year Award in 1999, and Peace with Justice, which won the International Association of Penal Law Book of the Year Award for 2003. Professor Scharf has testified as an expert

before the U.S. Senate Foreign Relations Committee and House Armed Services Committee. In February 2005, Professor Scharf and the Public International Law and Policy Group, a Non-Governmental Organization he co-founded, were nominated for the Nobel Peace Prize by six governments and the Prosecutor of an International Criminal Tribunal for the work they have done to help in the prosecution of major war criminals, such as Slobodan Milosevic, Charles Taylor, and Saddam Hussein.

IN THE

Supreme Court of the United States

KHALED A.F. AL ODAH, *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

I, Sarah H. Paoletti, hereby certify that I caused to be filed on August 23, 2007 via UPS with the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Motion for Leave to File *Amicus Curiae* Brief and Brief of International Law Professors in Support of Respondent Khadr, and further sent, via U.S. Mail, First Class Postage prepaid, three (3) copies of said Brief to:

Seth Waxman
Wilmer Cutler Pickering Hale and Dorr LLP
Counsel of Record for Petitioner Boumediene
1875 Pennsylvania Ave., N.W.
Washington, DC 20006

Tom Wilner
Shearman & Sterling LLP
Counsel of Record for Petitioner al Odah
801 Pennsylvania Ave., NW
Washington, DC 20004

Karma B. Brown
Hunton & Williams LLP
Counsel of Record for Respondent, Khalid
1900 K Street, NW
Washington, DC 20006

Paul D. Clement
Solicitor General
Counsel of Record for Respondent, President Bush
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

LCDR William Kubler, USN
Office of Military Commissions
Counsel of Record for Respondent, Khadr
Franklin Court Building, Suite 2000 E
1099 14th St., N.W.
Washington, DC 20005

I declare under penalty of perjury that the foregoing is true and correct.

Date: August 23, 2007

Sarah H. Paoletti
University of Pennsylvania
School of Law
3400 Chestnut Street
Philadelphia, PA 19104
Phone: (215) 898-8427